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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 AWAAZ BAKSH, Individually and on
15 Behalf of All Others Similarly Situated,

16 Plaintiff,

17 v.

18 NIVS INTELLIMEDIA TECHNOLOGY
19 GROUP, INC., TIANFU LI,
20 ALEXANDER CHEN, and SIMON
21 ZHANG,

22 Defendants.

23 Civil No. 2:11-cv-02647-R-JCG

24 **MEMORANDUM OF POINTS
25 AND AUTHORITIES IN SUPPORT
26 OF MOTION OF NEWMAN FOR
27 CONSOLIDATION OF ALL
28 RELATED CASES,
29 APPOINTMENT AS LEAD
30 PLAINTIFF, AND APPROVAL OF
31 LEAD COUNSEL**

32 DATE: July 5, 2011
33 TIME: 10:00 a.m.
34 JUDGE: Honorable Manuel L. Real
35 CTRM: 8

36 *[caption continued on next page]*

1 GAIL KWOK, Individually and on
2 Behalf of All Others Similarly Situated,

3 Plaintiffs,

4 v.

5 NIVS INTELLIMEDIA TECHNOLOGY
6 GROUP, INC., TIANFU LI, SIMON
7 ZHANG, and ALEXANDER CHEN,

8 Defendants.

9 IRA F/B/O EDWARD FRITSCHE,
10 Individually and on Behalf of All Others
11 Similarly Situated,

12 Plaintiffs,

13 v.

14 NIVS INTELLIMEDIA TECHNOLOGY
15 GROUP, INC., TIANFU LI,
16 ALEXANDER CHEN, SIMON ZHANG,
17 RUXIANG NIU, MINGHUI ZHANG,
18 GENQIANG YANG, CHARLES MO,
19 RODMAN & RENSHAW, LLC, and
20 WESTPARK CAPITAL, INC.,

21 Defendants.

22 ALI ARAR, Individually and on Behalf
23 of All Others Similarly Situated,

24 Plaintiff,

25 v.

26 NIVS INTELLIMEDIA TECHNOLOGY
27 GROUP, INC., TIANFU LI,
28 ALEXANDER CHEN, and SIMON
ZHANG,

Defendants.

Civil No. 2:11-cv-02716-R-JCG

Civil No. 2:11-cv-03004-R-JCG

Civil No. 2:11-cv-03857-R-JCG

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PRELIMINARY STATEMENT

Plaintiff Sean Newman (“Newman”) respectfully submit this Memorandum of Points and Authorities in support of his motion, pursuant to Section 21D(a)(3) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78u-4(a)(3), as amended by the Private Securities Litigation Reform Act of 1995 (the “PSLRA”) and Rule 42 of the Federal Rules of Civil Procedure, for an order: (i) consolidating all Related Actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure; (ii) appointing Newman as Lead Plaintiff on behalf of all persons who purchased or otherwise acquired NIVS Intellimedia Technology Group, Inc. (“NIVS” or the “Company”) securities (the “Class”); (iii) approving Newman’s selection of Pomerantz Haudek Grossman & Gross LLP (the “Pomerantz firm”) as Lead Counsel and Lieff, Cabraser, Heimann & Bernstein, LLP (the “Lieff firm”) as Liaison Counsel for the Class; and (iv) granting such other and further relief as the Court may deem just and proper.

INTRODUCTION

The above-captioned actions¹ (the “Related Actions”) are securities class action lawsuits that have been brought against NIVS and certain officers alleging violations of federal securities laws. The actions are on behalf of all persons or entities who purchased or otherwise acquired the securities of NIVS between March 24, 2010 and March 25, 2011, inclusive (the “Class Period”). The *Kwok* action includes purchasers of NIVS securities in the Company’s Secondary Public Offering commenced on or about April 20, 2010 (“Offering”). The *Fritzsche* action also seeks remedies under the Securities Act of 1933 on behalf of all persons or entities who purchased shares of NIVS common stock pursuant and/or traceable to the Company’s Offering.

²⁷ ²⁸ ¹ They are entitled the following: *Baksh v. NIVS Intellimedia Tech. Group, Inc.*, 11-02647-R-JCG; *Kwok v. NIVS Intellimedia Tech. Group, Inc.*, 11-02716-R-JCG; *IRA F/B/O Edward Fritsche v. NIVS Intellimedia Tech. Group, Inc.*, 11-03004-R-JCG; and *Arar v. NIVS Intellimedia Tech. Group, Inc.*, 11-03857-R-JCG.

Pursuant to the PSLRA, the court appoints as lead plaintiff the movant who possesses the largest financial interest in the outcome of the Action and who satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Newman, with a loss of \$421,876 in connection with his purchases of NIVS securities during the Class Period, is an adequate and typical to serve as lead plaintiff. Newman believes that he is the “most adequate plaintiff” as defined by the PSLRA and should be appointed Lead Plaintiff for these actions. Newman has the largest financial interest in the relief sought in these actions by virtue of his substantial investment in NIVS securities during the Class Period and the loss he suffered as a result of Defendants’ misconduct. Newman further satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure as an adequate loss representative with claims typical of the other Class members. Accordingly, Newman respectfully submits that he should be appointed Lead Plaintiff.

I. **STATEMENT OF FACTS**

Throughout the Class Period, Defendants made false and/or misleading statements, as well as failed to disclose material adverse facts about the Company's business, operations, and prospects. Specifically, Defendants made false and/or misleading statements and/or failed to disclose: (1) that the Company had inaccurately recorded certain transactions; (2) that there were discrepancies in the Company's accounts receivables; (3) that the Company was engaged in illegal acts involving the Company's accounting records and bank statements; (4) that, as a result, the Company's financial results were not prepared in accordance with Generally Accepted Accounting Principles; (5) that the Company lacked adequate internal controls; and (6) that, as a result of the foregoing, the Company's financial results were false and misleading at all relevant times.

On March 24, 2011, NYSE Regulation, Inc. unexpectedly announced that it was implementing a trading halt in the common stock of NIVS and evaluating both

1 the need for certain public disclosures and the overall suitability for continued
 2 listing of the Company's common stock.

3 On March 25, 2011, the Company disclosed that the Audit Committee of the
 4 Board of the Directors had approved the dismissal of NIVS's independent auditor,
 5 MaloneBailey LLP ("MaloneBailey"). Further, the Company indicated that
 6 MaloneBailey had provided a letter to the Audit Committee, advising that the
 7 independent auditor had encountered issues and concerns that, in their view,
 8 required additional information and procedures, including the initiation of an
 9 independent investigation, in order to verify the accuracy of certain transactions and
 10 balances recorded on the Company's financial statements and records. Moreover,
 11 MaloneBailey informed the Company in a letter of resignation that they "were
 12 unable to rely on management's representations as they relate to previously issued
 13 financial statements and [they] could no longer support its audit opinion dated
 14 March 24, 2010, related to [their] audit of consolidated financial statements of the
 15 Company and its subsidiaries as of December 31, 2009, included in the Company's
 16 annual report on Form 10-K for the fiscal year ended December 31, 2009."
 17 According to the Company, MaloneBailey "based its resignation on what it
 18 characterized illegal acts involving the Company's accounting records and bank
 19 statements and discrepancies in accounts receivable."

20 **II. ARGUMENT**

21 **A. THE RELATED ACTIONS SHOULD BE CONSOLIDATED**

22 On March 29, 2011, the first of at least four above-captioned actions against
 23 NIVS was filed in the Central District of California.² These Related Actions allege
 24 the same factual events and name the same core defendants. Further, the complaints
 25 allege similar legal bases for their claims: Sections 10(b) and 20(a) of the Exchange
 26 Act. In sum, the Related Actions involve common questions of fact and law.

27
 28 ² On April 12, 2011, an action was filed in the Southern District of New York
 entitled, *Schuler v. NIVS Intellimedia Tech. Group, Inc.*, 11 Civ. 2484-JGK.

1 Accordingly, pursuant to Fed. R. Civ. P. 42(a), the Related Actions may be
 2 consolidated for all purposes.

3 Consolidation of related cases is proper where, as here, the actions involve
 4 common questions of law and fact such that consolidation would prevent
 5 unnecessary cost or delay in adjudication:

6 When actions involving a common question of law or fact
 7 are pending before the court, it may order a joint hearing
 8 or trial of any or all of the matters in issue in the actions;
 9 it may order all the actions consolidated; and it may make
 such orders concerning proceedings therein as may tend
 to avoid unnecessary costs or delays.

10 Fed. R. Civ. P. 42(a). *See also Manual for Complex Litig. (3d)*, 20.123, at 13-14
 11 (1995).

12 The PSLRA contemplates consolidation where “more than one action on
 13 behalf of a class asserting substantially the same claim or claims arising under this
 14 chapter has been filed,” *see* 15 U.S.C. § 78u-4(a)(3)(A)(ii), and did not displace the
 15 traditional legal standards for consolidation under Fed. R. Civ. P. 42(a). *Aronson v.*
 16 *McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1150-51 (N.D. Cal. 1999). Under the
 17 traditional principles of consolidation, complaints may be considered regardless of
 18 whether the individual claims or causes of action are identical. As such, one court
 19 has recently noted, “neither Rule 42 nor the PSLRA demands that the actions be
 20 identical.” *Takeda v. Turbodyne Techs. Inc.*, 67 F. Supp. 2d 1129, 1133 (C.D. Cal.
 21 1999). Indeed, it has long been routine in federal securities actions to consolidate
 22 such complaints, and consider prejudicial to defendants not to consolidate such
 23 actions. *See, e.g., Fields v. Wolfson*, 41 F.R.D. 329, 330 (S.D.N.Y. 1967).

24 As noted above, here, the allegations in the Related Actions are based on the
 25 same underlying facts and events, which occurred during the same time period, and
 26 charge the same core defendants with violations of the federal securities laws.

27 The consolidation of these actions will expedite pretrial proceedings, reduce
 28 duplication, avoid contacting of parties and witnesses for inquiries in multiple

1 proceedings and minimize the expenditure of time and money by all persons
 2 concerned. Moreover, consolidation will reduce the confusion and delay that may
 3 result from prosecuting these related class action cases separately. Further, the
 4 defendants have not stated any prejudice that they would suffer as a result of
 5 consolidation of these actions. Thus, the motion by Newman to consolidate the
 6 Related Actions should be granted.

7 **B. NEWMAN SHOULD BE APPOINTED LEAD PLAINTIFF FOR**
 8 **THE CLASS**

9 Section 21D(a)(3)(B) of the PSLRA sets forth procedures for the selection of
 10 Lead Plaintiffs in class actions brought under the Exchange Act. The PSLRA
 11 directs courts to consider any motion to serve as Lead Plaintiff filed by class
 12 members in response to a published notice of class action by the later of (i) 90 days
 13 after the date of publication, or (ii) as soon as practicable after the Court decides
 14 any pending motion to consolidate. 15 U.S.C. § 78u-4(a)(3)(B)(i) and (ii).

15 Further, under 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), the Court is directed to
 16 consider all motions by plaintiffs or purported class members to appoint lead
 17 plaintiffs filed in response to any such notice. Under this section, the Court “shall”
 18 appoint “the presumptively most adequate plaintiff” to serve as lead plaintiff and
 19 shall presume that plaintiff is the person or group of persons, that:

20 (aa) has either filed the complaint or made a motion in
 21 response to a notice . . .;

22 (bb) in the determination of the Court, has the largest
 23 financial interest in the relief sought by the class; and

24 (cc) otherwise satisfies the requirements of Rule 23 of the
 25 Federal Rules of Civil Procedure.

26 See *Erikson v. Cornerstone Propane Partners LP*, 2003 U.S. Dist. LEXIS 18009, at
 27 *8-*9 (N.D. Cal. Sept. 9, 2003); *Squyres v. Union Texas Petroleum Holdings, Inc.*,
 28 1998 U.S. Dist. LEXIS 22945, at *5 (C.D. Cal. Nov. 2, 1998); *Osher v. Guess?, Inc.*, 2001 U.S. Dist. LEXIS 6057, at *11 (C.D. Cal. Apr. 26, 2001).

1 As set forth below, Newman satisfies all three of these criteria and thus is
 2 entitled to the presumption that he is the most adequate plaintiff of the Class and,
 3 therefore, should be appointed Lead Plaintiff for the Class.

4 **1. Newman Is Willing to Serve as a Class Representative**

5 On March 29, 2011, counsel in the first filed action against the defendants
 6 caused a notice to be published pursuant to Section 21D(a)(3)(A)(i) of the PSLRA
 7 announcing that a securities class action had been filed against the defendants
 8 herein, and investors of NIVS securities that they had until May 31, 2011, to file a
 9 motion to be appointed as Lead Plaintiff. *See Dahlstrom Decl.*, Exhibit A.

10 Newman has filed the instant motion pursuant to the Notice and has attached
 11 Certification attesting that he is willing to serve as Lead Plaintiff for the Class and
 12 is willing to provide testimony at depositions and trial, if necessary. *See Dahlstrom*
 13 *Decl.*, Exhibit B. Accordingly, Newman satisfies the first requirement to serve as
 14 Lead Plaintiff for the Class.

15 **2. Newman Has the Largest Financial Interest in the Action**

16 As noted above, the PSLRA establishes a rebuttable presumption that the
 17 most adequate plaintiff is the “person” or “group of persons” who “has the largest
 18 financial interest in the relief sought by the class,” and who also satisfies the
 19 requirements of Fed. R. Civ. P. 23. 15 U.S.C. §78u-4(a)(3)(B)(iii)(I). This
 20 presumption can only be rebutted by proof that the presumptively most adequate
 21 plaintiff “will not fairly and adequately protect the interests of the class” or is
 22 “subject to unique defenses that render such plaintiff incapable of adequately
 23 representing the class.” 15 U.S.C. §78u-4(a)(3)(B)(iii)(II). *In re Gemstar-TV Guide*
Int'l. Sec. Litig., 209 F.R.D. 447, 450 (C.D. Cal. 2002).

25 As of the time of the filing of this motion, Newman believes that he has the
 26 largest financial interest of anyone in the relief sought by the Class. Newman
 27 purchased (1) 206,500 NIVS shares (2) expended over \$457,599 for his NIVS
 28 securities; (3) retained 189,500 of his NIVS shares at the end of the Class Period;

1 and (4) suffered a loss of approximately \$421,876 related to his purchases. *See*
 2 Dahlstrom Decl., Exhibit C. *See also In re McKesson HBOC, Inc. Sec. Litig.*, 97 F.
 3 Supp. 993 (N.D. Cal. 1999); *In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 296
 4 (E.D.N.Y. 1998); *Lax v. First Merchants Acceptance Corp.*, 1997 U.S. Dist. LEXIS
 5 11866, 1997 WL 461036, at *5 (N.D. Ill. Aug. 11, 1997). Because Newman
 6 possesses the largest financial interest in the outcome of this litigation, he may be
 7 presumed to be the “most adequate” plaintiff. 15 U.S.C. § 78u-
 8 4(a)(3)(B)(iii)(I)(bb).

9 **3. Newman Satisfies the Requirements of Rule 23 of the**
Federal Rules of Civil Procedure

10 The PSLRA requires that the lead plaintiff must satisfy the requirements of
 11 Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-
 12 (a)(3)(B)(iii)(I)(cc). With respect to the claims of class representatives, Rule 23(a)
 13 requires that (1) the class is so numerous that joinder of all members is
 14 impracticable; (2) there are questions of law or fact common to the class; (3) such
 15 claims are typical of those of the class; and (4) the representatives will fairly and
 16 adequately protect the interests of the class. For purposes of a motion to appoint
 17 lead plaintiff pursuant to the PSLRA, however, all that is required is a “preliminary
 18 showing” that the lead plaintiff’s claims are typical and adequate. *Aronson*, 79 F.
 19 Supp. 2d at 1158 (citing *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 587 (N.D.
 20 Cal. 1999)). *See Tanne v. Autobytel, Inc.*, 226 F.R.D. 659, 666 (C.D. Cal. 2005).

21 The typicality requirement of Fed. R. Civ. P. 23(a)(3) is satisfied where the
 22 named representative’s claims have the “same essential characteristics as the claims
 23 of the class at large.” *Danis v. USN Communs., Inc.*, 189 F.R.D. 391, 395 (N.D. Ill.
 24 1999). “A class is typical if it arises from the same event or course of conduct that
 25 gives rise to claims of other class members and all claims are based on the same
 26 legal theory.” *Id.* Indeed, the “similarity of legal theory may control even where
 27 factual distinctions exist between the claims of the named representatives and the
 28

1 other class members.” *Id.* See *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508
 2 (9th Cir. 1992) (The typicality requirement serves to “assure that the interest of the
 3 named representative aligns with the interests of the class.”) (citation omitted).

4 Newman’s claims are typical of those of the Class. He alleges, as do all class
 5 members, that defendants violated the Exchange Act by making what they knew or
 6 should have known were false or misleading statements of material facts
 7 concerning NIVS, or omitted to state material facts necessary to make the
 8 statements they did make not misleading. Newman, as did all members of the Class,
 9 purchased NIVS securities during the Class Period at prices artificially inflated by
 10 defendants’ misrepresentations or omissions and was damaged upon the disclosure
 11 of those misrepresentations and/or omissions. These shared claims, which are
 12 based on the same legal theory and arise from the same events and course of
 13 conduct as the class claims, satisfy the typicality requirement of Rule 23(a)(3).

14 The adequacy of representation requirement of Rule 23(a)(4) is satisfied
 15 where it is established that a representative party “will fairly and adequately protect
 16 the interests of the class.” Accordingly,

17 The Ninth Circuit has held that representation is
 18 “adequate” when counsel for the class is qualified and
 19 competent, the representative’s interests are not
 antagonistic to the interests of absent class members, and
 it is unlikely that the action is collusive.

20
 21 *Takeda*, 67 F. Supp. 2d at 1137 (citing *In re Northern Dist. Of Cal., Dalkon Shield*
 22 *IUD Prod. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982)). *Accord Lerwill v.*
 23 *Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). The class
 24 representative must also have “sufficient interest in the outcome of the case to
 25 ensure vigorous advocacy.” *Takeda*, 67 F. Supp. 2d at 1137 (citing *Riordan v.*
 26 *Smith Barney*, 113 F.R.D. 60, 64 (N.D. Ill. 1986)).

27 Newman is an adequate representative for the Class. There is no antagonism
 28 between his interests and those of the Class and his loss demonstrates that he has a

1 sufficient interest in the outcome of this litigation. Moreover, he has retained
 2 counsel highly experienced in prosecuting securities class actions such as this
 3 action, vigorously and efficiently, and submit their choices to the Court for
 4 approval pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v).

5 **4. Newman Fairly and Adequately Represent the Interests of**
the Class and is Not Subject to Unique Defenses

7 The presumption in favor of appointing Newman as Lead Plaintiff may be
 8 rebutted only upon proof “by a purported member of the plaintiffs’ class” that the
 9 presumptively most adequate plaintiff:

- 10 (aa) will not fairly and adequately protect the interest of
 the class; or
 11 (bb) is subject to unique defenses that render such
 plaintiff incapable of adequately representing the
 12 class.

14 15 U.S.C. § 78u-4(a)(3)(b)(iii)(I).

15 Newman’s ability and desire to fairly and adequately represent the Class
 16 have been discussed above. Newman is not aware of any unique defenses
 17 Defendants could raise that would render him inadequate to represent the Class.
 18 Thus, Newman should be appointed Lead Plaintiff for the Class.

19 **C. LEAD PLAINTIFF’S SELECTION OF LEAD COUNSEL**
SHOULD BE APPROVED

20 The PSLRA vests authority in the lead plaintiff to select lead counsel, subject
 21 to approval by the Court. 15 U.S.C. § 78u-4(a)(3)(B)(v); *Osher*, 2001 U.S. Dist.
 22 LEXIS 6057, at *15. The Court should only interfere with lead plaintiff’s selection
 23 when necessary “to protect the interests of the class.” 15 U.S.C. § 78u-
 24 4(a)(3)(B)(iii)(II)(aa).

25 Here, Newman has selected the Pomerantz firm to serve as Lead Counsel and
 26 Lieff firm to serve as Liaison Counsel for the Class. As detailed in their firm
 27 resumes (*see* Dahlstrom Decl., Exhibits D and E), the Pomerantz firm and the Lieff
 28

1 firm have extensive expertise and experience in the field of securities litigation and
2 have successfully prosecuted numerous securities fraud class actions and obtained
3 excellent recoveries on behalf of defrauded investors. Thus, the Court may be
4 confident that the Class will receive the highest caliber of legal representation.

5 **CONCLUSION**

6 WHEREFORE, Newman respectfully requests that the Court issue an order:
7 (1) consolidating the related actions; (2) appointing Newman as Lead Plaintiff for
8 the Class; (3) approving Newman's selection of Lead and Liaison Counsel for the
9 Class; and (4) granting such other and further relief as the Court may deem just and
10 proper.

11 Dated: May 31, 2011

Respectfully submitted,

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& BERNSTEIN, LLP**

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11 Newman and Proposed Lead Counsel and
12 Liaison Counsel for the Class
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